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OFFICE OF PETITIONS

In re Application of :
Carpenter, et al. :
Application No. 10/645,272 : ON PETITION
Filed: August 21, 2003 :
Attorney Docket No. PH-7108 (BMS-2301) :

This is a decision on papers filed on December 8, 2003, which is being treated as a petition under 37 CFR 1.53, requesting that the above-identified application be accorded a filing date of August 21, 2003, including page 56 of the specification. The file was recently forwarded to this office for consideration of the petition.

The application was submitted on August 21, 2003. However, on November 20, 2003, the Office of Initial Patent Examination (OIPE) mailed a "Notice To File Corrected Application Papers" (Notice) that stated the application had been accorded a filing date, and that page 56 of the specification appears to have been omitted.

In response, on December 8, 2003, the instant petition and a copy of the specification were filed. Petitioner argues that page 56 of the specification was filed on August 21, 2003.

"Applicant asserts that the items indicated as omitted were in fact deposited with the P.T.O. with the original application as indicated on the attached copy of the Application Transmittal Letter, page 2 "[X] A copy of the specification including claims and abstract (pages 1-205) and drawings and appendixes (if any) of earlier Application No. 09/783,249 filed February 14, 2001, to which no new matter has been added. Such earlier application is hereby incorporated into the present application by reference." papers filed on August 21, 2003."

In support, petitioner states a copy of the original Application Transmittal Letter is attached. This attachment cannot be located in the application file. However, the original Application Transmittal Letter, filed August 21, 2003, is found in the application file and shall be used instead.

Petitioners argument is not persuasive. The Patent and Trademark Office (Office) file is the official record of the papers originally filed in this application. A review of the official file reveals two-hundred-four (204) pages of specification, claims and abstract were filed on August 21, 2003. Page 56 of the specification was not filed on August 21, 2003, since no such page is present in the file. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The Application Transmittal Letter is not more probative than the official file record of what was actually received on August 21, 2003, which does not contain page 56 of the specification.

The Office has a well established and well publicized practice of providing a receipt for papers filed in the Office to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the Office with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the Office of all the items listed thereon on the date stamped thereon by the Office. See MPEP 503.

However, based on petitioners' representation, and as noted in the Application Transmittal Letter, that the specification supplied with the petition is a part of the disclosure of application No. 09/738,249 and the entire disclosure of application 09/783,249 was specifically incorporated by reference in the present application on August 21, 2003, it appears that page 56 of the specification was present in the Office on August 21, 2003, albeit in the file of another application, i.e., application No. 09/783,249. Therefore, on petition, the application may be accorded the requested filing date, including page 56 of the specification.

The petition is granted.

Please note, the petition fee will not be refunded, since the petition was required to accord the application the requested filing date with page 56 of the specification.

Of course, the primary examiner is expected to compare the copy of page 56 of the specification supplied on December 8, 2003, to the disclosure of prior application No. 09/783,249 in order to verify that the copy of page 56 of the specification is, in fact, part of the disclosure of the prior application.

The application is being returned to the Office of Initial Patent Examination for further processing with a filing date of August 21, 2003, using the copy of page 56 of the specification supplied on December 3, 2003.

Telephone inquiries should be directed to the undersigned at (571)272-3228.

A handwritten signature in black ink, appearing to read 'Ed J. Tannouse', with a long horizontal flourish extending to the right.

Edward J. Tannouse
Petitions Attorney
Office of Petitions
United States Patent and Trademark Office